TRA Mining (M) Sdn Bhd v Thien Hong Teck & Ors and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(i)-49–07 OF 2015(W) AND 02(i)-50–07 OF 2015(W)
AHMAD MAAROP CJ (MALAYA), RAMLY ALI, AZAHAR MOHAMED, BALIA YUSOF AND AZIAH ALI FCJJ
8 AUGUST 2018

Partnership — Assignment of share in partnership — Power of attorney — Partner absolutely assigned his rights, title and interests in partnership shares to company and executed power of attorney ('PA') in favour of company's director — Partner later became bankrupt — Whether absolute nature of assignment allowed assignee through the PA holder to become partner in bankrupt partner's place in the partnership — Whether nothing in the deed of assignment or the PA allowed the assignee or PA holder to become partner — Whether fact that the other existing partners were given notice of the assignment and the PA did not mean they had in any way consented to accept assignee as partner — Whether existing partners had locus standi to sue assignee for infringing their legal rights and interests

The sole issue for determination in the instant appeals was whether an assignee of a partner could be deemed to be a partner for the purpose of ascertaining how many partners were in a partnership when a winding-up petition was presented against it under ss 314 and 315 of the Companies Act 1965 ('the CA). Under s 314, a partnership with more than five members was considered an 'unregistered company' which could be wound up under s 315. The issue in the present case arose because one of the appellants herein, TRA Mining (M) Sdn Bhd ('TRA') had presented a winding up petition as a creditor against a partnership ('ARCI') on the latter's failure to settle an alleged RM6.2m debt. ARCI was formed by two partners ('Syed' and 'Yee') who were later joined by the five common respondents herein ('the respondents'), making the total number of partners at that time, seven. Syed later sold all his rights, title and interests in his shares in ARCI to TRA. To perfect that transaction, Syed executed a deed of absolute assignment in TRA's favour and a power of attorney ('the PA') in favour of a director of TRA ('Cedric') to do all things and sign all documents on his behalf as a partner in ARCI. When Syed and Yee were adjudged bankrupts, ARCI was re-registered in the same name but with only the five respondents as partners. It was during that time that the winding up petition was presented against ARCI. The High Court ordered ARCI to be wound up and appointed the other appellant herein, Mohd Afrizan bin Husain ('Afrizan') as the provisional liquidator. A suit filed by the respondents against TRA, Afrizan and Cedric to set aside the winding-up order and Afrizan's appointment went through two decisions before the High Court and an appeal

before the Court of Appeal ('the COA') before it came before the Federal Court which remitted the case back to the High Court for a full trial to determine exactly how many partners were in ARCI when the winding-up petition was presented. After a full trial, the High Court decided, inter alia, that only the five respondents were partners of ARCI when the petition was presented and therefore it could not be wound up under ss 314/315 of the CA. The COA upheld the decision and dismissed the appeals by TRA and Afrizan. The question of law posed to the Federal Court in the instant appeal against the COA's decision was whether by virtue of the deed of assignment, TRA could be deemed to have become a partner of ARCI for the purpose of ascertaining how many partners were in ARCI when the winding up petition was presented against it.

Held, dismissing the appeals herein, affirming the decisions of the courts below and answering the question of law in the negative:

(1) The rights and interests of an assignee were strictly confined by the terms and scope of the assignment agreement. This was important in the present case so that the interests of the other existing partners were not prejudiced or adversely affected. A partnership contract was based on the personal relationship that existed between the partners. An assignment by a partner of his partnership shares entitled the assignee to limited rights only as expressly provided for in the assignment agreement and not otherwise. The scope of the deed of assignment in the present case was not unlimited. It did not cover everything that Syed as a partner would have done in running the business and affairs of ARCI. The assignment and the PA did not have the object of making TRA or Cedric a partner in the partnership in Syed's place or allow them to take part or interfere in the management or administration of the partnership business or affairs. Under s 33(1) of the Partnership Act 1961, TRA was only entitled to receive the share of profits to which Syed was otherwise entitled. The wording of the deed of assignment was too general. There was nothing to show that the assignment conferred upon TRA the status of partner in the partnership. The general words in the deed of assignment and the PA did not confer general powers to the assignee or the attorney. Subject to statutory restrictions, those words could only be interpreted limited to the purpose for which the authority or power was given. In the present case, the purpose of the assignment was as set out in cl 6 thereof (see paras 61–62 & 79).

(2) The appellants' argument, relying upon s 4(3) of the Civil Law Act 1956 that the absolute nature of the assignment in this case entitled the assignee to be substituted in place of the assignor could not be upheld. Subsection 4(3) only dealt with an assignment of a debt or chose in action. It did not in any way pass or transfer the status of the assignor in a partnership to the assignee. Section 3(1) of the Partnership Act 1961

defined a partnership as 'a relationship between persons carrying on business in common with a view of profit'. That relationship between the partners could not be assigned, either absolutely or conditionally, under s 4(3) of the Civil Law Act 1956 (see paras 106 & 108). A

(3) The assignment in the present case made no mention about Syed's 'liability' in the event the partnership was dissolved. It was trite that if a partnership was dissolved, terminated or wound up, all partners as contributories were equally liable if there was any shortfall in assets to pay off debts. If TRA was accepted as a partner (even for the purpose of a winding-up process under s 314 of the CA) it would have escaped such 'liability'. This was undesirable to the business world as it would create unfair dealings which might prejudice the other existing partners (see para 81). B C

(4) The fact that the existing partners were given express notice of the assignment and the PA did not mean that they had consented to accept TRA or Cedric as a partner in ARCI. Nothing in the deed of assignment expressly indicated that TRA or Cedric were given the status of a partner in the partnership in place of Syed nor was there any evidence that the partners had tacitly consented to accept or admit TRA or Cedric as a partner. Hence, neither TRA nor Cedric could be considered a partner for the purpose of s 314 of the CA (see paras 65 & 69–70). D E

(5) The respondents had locus standi to sue the appellants in the High Court. They sued individually as partners of the partnership and not 'in the name of' or 'on behalf of' ARCI. Each one of them was the plaintiff in the writ action and not ARCI. The respondents disputed ARCI's alleged debt to TRA on which the winding-up petition was based and sought to set aside the winding-up order and Afrizan's appointment as liquidator. As partners and contributories of ARCI, they had legitimate interests in settling accounts as between themselves either in making contributions to make good losses or deficiencies of capital to pay up debts or to be paid on the ultimate residue, if any. Those interests were sufficient grounds to give them the locus standi. There was prima facie an infringement of their legal rights and/or breach of statutes which affected their interests substantially. They had a genuine interest in having their legal position determined by the court in the proceedings (see paras 88, 90, 93–94 & 100). F G H

[Bahasa Malaysia summary

Satu-satunya isu untuk ditentukan dalam rayuan-rayuan ini adalah sama ada pemegang serah hak seorang rakan kongsi boleh dianggap sebagai seorang rakan kongsi bagi tujuan menentukan bilangan rakan kongsi dalam perkongsian apabila petisyen penggulungan dikemukakan terhadapnya di bawah ss 314 dan 315 Akta Syarikat 1965 ('AS'). Di bawah s 314, suatu I

perkongsian yang melebihi lima ahli dianggap sebagai suatu 'syarikat tidak berdaftar' yang boleh digulungkan di bawah s 315. Isu dalam kes ini timbul kerana salah seorang daripada perayu-perayu, TRA Mining (M) Sdn Bhd ('TRA') telah mengemukakan petisyen penggulungan sebagai pemiutang terhadap suatu perkongsian ('ARCI') kerana kegagaln ARCI untuk menyelesaikan hutang yang dikatakan sejumlah RM6.2 juta. ARCI ditubuhkan oleh dua rakan kongsi ('Syed' dan 'Yee') yang kemudian telah disertai oleh lima responden biasa ('responden tersebut'), yang menjadikan bilangan rakan kongsi pada masa itu, berjumlah tujuh orang. Syed kemudian telah menjual semua hak, hak milik dan kepentingannya dalam sahamnya dalam ARCI kepada TRA. Untuk menyempurnakan transaksi tersebut, Syed telah menyempurnakan surat ikatan penyerahhakan mutlak yang berpihak kepada TRA dan surat kuasa wakil ('SKW') yang berpihak kepada pengarah TRA ('Cedric') untuk melakukan semua benda dan menandatangani semua dokumen bagi pihaknya sebagai rakan kongsi dalam ARCI. Apabila Syed dan Yee diisytharkan bankrap, ARCI telah didaftarkan semula atas nama yang sama tetapi dengan hanya lima responden sebagai rakan kongsi. Pada masa itu petisyen penggulungan telah dikemukakan terhadap ARCI. Mahkamah Tinggi telah memerintahkan ARCI digulung dan melantik perayu, Mohd Afrizan bin Husain ('Afrizan') sebagai pelikuidasi sementara. Suatu guaman telah difailkan oleh responden-responden terhadap TRA, Afrizan dan Cedric untuk mengetepikan perintah penggulungan itu dan pelantikan Afrizan melalui dua keputusan di hadapan Mahkamah Tinggi dan satu rayuan di hadapan Mahkamah Rayuan ('MR') sebelum ia dihadapkan ke Mahkamah Persekutuan yang telah diremitkan kes itu ke Mahkamah Tinggi untuk perbicaraan penuh bagi menentukan sebenarnya bilangan rakan kongsi dalam ARCI apabila petisyen penggulung itu dikemukakan. Selepas perbicaraan penuh, Mahkamah Tinggi memutuskan, antara lain, bahawa hanya lima responden adalah rakan kongsi ARCI semasa petisyen tersebut dikemukakan dan oleh itu ia tidak boleh digulungkan di bawah ss 314/315 AS. MR mengekalkan keputusan itu dan menolak rayuan-rayuan oleh TRA dan Afrizan. Persoalan undang-undang yang dikemukakan kepada Mahkamah Persekutuan dalam rayuan ini terhadap keputusan MR adalah sama ada menurut surat ikatan penyerahan hak, TRA boleh dianggap menjadi rakan kongsi ARCI bagi tujuan memastikan bilangan rakan kongsi dalam ARCI semasa petisyen penggulungan tersebut dikemukakan terhadapnya.

Diputuskan, menolak rayuan-rayuan, mengesahkan keputusan mahkamah bawahan dan menjawab persoalan undang-undang secara negatif:

(1) Hak dan kepentingan pemegang serah hak telah dibatasi oleh syarat dan skop perjanjian penyerahhakan. Ini adalah penting dalam kes ini supaya kepentingan rakan kongsi lain yang sedia ada tidak diprejudiskan atau terjejas teruk. Kontrak perkongsian adalah berasaskan pada hubungan peribadi yang wujud antara rakan kongsi. Penguntukan oleh rakan

kongsi tentang saham perkongsiannya memberi hak kepada pemegang serah hak itu hanya hak yang terhad sepertimana yang diperuntukkan secara nyata dalam perjanjian penguntukan dan tidak sebaliknya. Skop surat ikatan penguntukan dalam kes ini tidak terhad. Ia tidak meliputi segala yang dilakukan Syed sebagai rakan kongsi dalam menjalankan perniagaan dan urusan ARCI. Penguntukan dan SKW tersebut tidak mempunyai tujuan untuk menjadikan TRA atau Cedric sebagai rakan kongsi dalam perkongsian di tempat Syed atau membenarkan mereka mengambil bahagian atau campur tangan dalam pengurusan atau pentadbiran perniagaan atau urusan perkongsian. Di bawah 33(1) Akta Perkongsian 1961, TRA hanya berhak menerima bahagian keuntungan yang mana Syed sebaliknya berhak. Kata-kata dalam surat ikatan penguntukan tersebut adalah terlalu umum. Tiada apa-apa untuk menunjukkan bahawa penguntukan yang memberikan TRA status rakan kongsi dalam perkongsian itu. Kata-kata umum dalam surat ikatan penguntukan tersebut dan SKW tersebut tidak memberikan kuasa umum kepada pemegang serah hak atau peguam. Tertakluk kepada sekatan statutori, kata-kata itu hanya boleh ditafsirkan terhad sebagai tujuan yang mana kebenaran atau kuasa diberikan. Dalam kes ini, tujuan penguntukan tersebut adalah seperti yang dinyatakan dalam fasal 6 (lihat perenggan 61–62 & 79).

(2) Hujah perayu, yang bergantung pada s 4(3) Akta Undang-Undang Sivil 1956 bahawa sifat mutlak penguntukan dalam kes ini memberi hak kepada pemegang serah hak untuk menggantikan tempat penyerah hak tidak boleh dikekalkan. Subseksyen 4(3) hanya berurusan dengan penguntukan hutang atau hak dalam tindakan. Ia tidak dalam apa-apa cara menyerah atau memindahkan status penyerah hak dalam perkongsian kepada pemegang serah hak. Seksyen 3(1) Akta Perkongsian 1961 mentafsirkan perkongsian sebagai 'perhubungan yang wujud antara orang yang menjalankan urusan bersama dengan tujuan mendapat keuntungan bersama'. Hubungan itu antara rakan kongsi tidak dapat diserahhakan, sama ada secara mutlak atau bersyarat, di bawah s 4(3) Akta Undang-Undang Sivil 1956 (lihat perenggan 106 & 108).

(3) Penguntukan dalam kes ini tidak menyebut tentang 'liabiliti' Syed sekiranya perkongsian itu dibubarkan. Adalah rumit bahawa sekiranya perkongsian dibubarkan, ditamatkan atau digulung, semua rakan kongsi sebagai penyumbang sama-sama bertanggungjawab jika ada kekurangan aset untuk membayar hutang. Jika TRA diterima sebagai rakan kongsi (walaupun untuk tujuan proses penggulungan di bawah s 314 AS), ia akan melarikan diri dari 'liabiliti' tersebut. Ini tidak diingini oleh dunia perniagaan kerana ia akan mewujudkan urusan yang tidak adil yang mungkin menjejaskan rakan kongsi sedia ada yang lain (lihat perenggan 81).

A (4) Hakikat bahawa rakan kongsi yang sedia ada diberi notis nyata tentang penguntukan dan SKW itu tidak bermakna mereka telah bersetuju untuk menerima TRA atau Cedric sebagai rakan kongsi dalam ARCI. Tiada apa-apa dalam surat ikatan penguntukan yang jelas menunjukkan bahawa TRA atau Cedric telah diberikan status rakan kongsi dalam
B perkongsian menggantikan Syed dan tidak ada bukti bahawa rakan-rakan kongsi telah bersetuju untuk menerima atau mengakui TRA atau Cedric sebagai rakan kongsi. Oleh itu, TRA atau Cedric tidak boleh dianggap sebagai rakan kongsi bagi maksud s 314 AS (lihat perenggan 65 & 69–70).

C (5) Responden mempunyai lokus standi untuk menyaman perayu-perayu di Mahkamah Tinggi. Mereka menyaman secara berasingan sebagai rakan kongsi perkongsian dan bukan 'atas nama' atau 'bagi pihak' ARCI. Setiap seorang daripada mereka adalah plaintif dalam tindakan writ dan bukan
D ARCI. Responden-responden mempertikaikan hutang yang dikatakan oleh ARCI kepada TRA di mana petisyen penggulungan adalah berdasarkan dan memohon untuk mengetepikan perintah penggulungan dan pelantikan Afrizan sebagai pelikuidasi. Sebagai rakan kongsi dan penyumbang ARCI, mereka mempunyai kepentingan sah dalam
E menyelesaikan akaun antara mereka sama ada dalam membuat sumbangan untuk menangani kerugian dengan baik atau kekurangan modal untuk membayar hutang atau yang perlu dibayar dengan sisa akhir, jika ada. Kepentingan tersebut adalah alasan yang mencukupi
F untuk memberi mereka locus standi. Secara prima facie terdapat pelanggaran hak undang-undang mereka dan/atau pelanggaran undang-undang yang menjejaskan kepentingan mereka dengan ketara. Mereka mempunyai kepentingan yang tulen untuk menentukan kedudukan perundangan mereka oleh mahkamah dalam prosiding (lihat
G perenggan 88, 90, 93–94 & 100).]

Notes

For a case on power of attorney, see 10(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 1072.

H

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Boyce v Paddington Borough Council [1903] 1 Ch 109, Ch D (refd)

I *Bray v Fromont & Others* (1821) 6 Madd 5; [1821] Feb 6 (refd)

Cassels v Stewart (1881) 6 App Cas 64, HL (refd)

Chon Ah Jee @ Chuan Teck Chun & Ors v Lim Tian Huat (as the receiver and manager appointed for Bigraise Telipok Sdn Bhd) & Anor [2010] 4 MLJ 270, HC (refd)

Dewan Pemuda Masjid Malaysia v SIS Forum (Malaysia) [2012] 1 MLJ 126, HC (refd)
Eu Finance Berhad v Lim Yoke Foo [1982] 2 MLJ 37, FC (refd)
Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12, SC (refd)
Hayes v Bristol Plant Hire Ltd & Ors [1957] 1 All ER 685, Ch D (refd)
In re Bowling & Welby's Contract [1895] 1 Ch 663, CA (refd)
K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBF Finance Bhd & Anor [2005] 2 MLJ 201, FC (refd)
Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor [2011] 1 MLJ 486, CA (refd)
Mohamed Tawfik bin Tun Dr Ismail v HLG Credit Sd Bhd & Anor [2012] 2 MLJ 626; [2012] 2 CLJ 65, CA (refd)
Ong Kian Loo v Hock Wah Trading Co [1990] 1 MLJ 315, HC (refd)
Sri Alam Sdn Bhd v Newacres Sdn Bhd [1992] MLJU 19, HC (refd)
Tan Guan Eng & Anor v Ng Kweng Hee & Ors [1992] 1 MLJ 487, HC (refd)
Tan Sri Othman Saat v Mohamad Ismail [1982] 2 MLJ 177, FC (refd)
Thein Hong Teck & Ors v Mohd Afrizan bin Husain and another appeal [2012] 2 MLJ 299, FC (refd)

Legislation referred to

Bankruptcy Act 1967 (now Insolvency Act 1967) s 38(1)(d)
Civil Law Act 1956 s 4(3)
Companies Act 1965 ss 31(2), 314, 314(1), (2), 315, 316(1), Part X
Companies Act 1862 [UK] s 199
Partnership Act 1961 ss 3(1), 26(g), 33, 33(1), (2), 35, 37, 40, 41, 46
Powers of Attorney Act 1949 s 6(1)
Rules of the High Court 1980 O 14A, O 18 r 19(1)(b), (1)(d)

Appeal from: Civil Appeal Nos W-02(NCC)(W)-323–02 of 2013 and W-02(NCC)(W)-322–02 of 2013 (Court of Appeal, Putrajaya)

Mohd Arief Emran Arifin (Nimi Sha a/p Jaya Gobi with him) (Wong & Partners) for the appellant.
Lim Kian Leong (Alvin Oh Seong Yew, Foo Siew Yin and Goh Gin Jhen with him) (Sia Siew Mun & Co) for the respondents.

Ramly Ali FCJ (delivering judgment of the court):

INTRODUCTION

[1] There are two related appeals heard together before us. The first appeal is Civil Appeal No 02(i)-49–07 of 2015(W) where the appellant is TRA Mining (M) Sdn Bhd ('TRA'); while the second appeal is Civil Appeal No 02(i)-50–07 of 2015(W) where the appellant is Mohd Afrizan bin Husain ('Afrizan'). TRA was the first defendant at the High Court in an action brought by the plaintiffs

A and the Afrizan was the second defendant there.

[2] Both appeals are against the decision of the Court of Appeal which had dismissed the appellants' appeals with costs of RM20,000 to be paid to the respondents. The Court of Appeal had affirmed and upheld the decision of the
B High Court which had allowed the respondents' ('the plaintiffs') claim against the appellants' (the first and second defendants vide their writ summons D-22-NCC-776 of 2009. In that action the plaintiffs sued TRA as the first defendant, Afrizan as the second defendant and one Cedric David Joseph Williamson ('Cedric') as the third defendant.
C

FACTUAL BACKGROUND

[3] ARCI Enterprise (Registration No 000915175-X) was a registered
D partnership started by one Syed Kharul Azhar ('Syed') and one Yee Chang Men ('Yee') which was registered on 8 October 1992 for a fixed term of eight years, expiring on 28 October 2000. The five plaintiffs in the action later joined Syed and Yee in the partnership on 28 April 1993 resulting in there together seven partners in the partnership at that time. The partnership was formed to mine
E gold pursuant to a mining lease vide Mining Certificate No 1/113 at Mukim Ulu Jelai, Sungai Kermoi, Daerah Kuala Lipis, Pahang which was granted on 18 November 1996.

[4] The background facts of the case leading to the present appeals are as
F follows: One of the partners ('Syed') held 5% shares in ARCI Enterprise. He decided to sell all his rights, title and interests in his shares in ARCI Enterprise to TRA for a consideration of RM4m. For that purpose, a deed of assignment dated 30 January 1997 was executed by Syed in favour of TRA. To facilitate the execution of the assignment, Syed on the same date, executed a power of
G attorney in favour Cedric (Cedric), who was a director of TRA at the material time, as his attorney to do and perform all acts and/or exercise all powers and rights of the donor (Syed) as a partner of ARCI Enterprise. Cedric, whose address of service was in Melbourne, had not been served with the writ, thus he was not a party to the action though named as the third defendant.
H

[5] Soon after that (on 25 February 1997) a joint venture agreement ('JVA') was entered into by ARCI Enterprise (executed by all partners) and TRA to collaborate and co-operate in the exploration and exploitation activities and the mining operation on the mining land in question.
I

[6] Later, dispute arose and ARCI Enterprise terminated the JVA. The eight year period fixed for the partnership expired on 28 October 2000. In the meantime, Yee and Syed were respectively adjudicated bankrupt on 9 July 2003 and 19 April 2005. The second partnership comprising of seven former

partners of ARCI Enterprise was registered on 29 July 2004 with the same name for a period of one year until 28 July 2005. On 12 January 2006, after expiry of the second partnership, the third partnership with the same name was registered but with only five surviving partners (excluding Syed and Yee) for a period of one year from 11 January 2007. A

B

[7] Sometimes on 27 April 2007, Cedric, acting under the power of attorney granted to him earlier by Syed gave notice to convene a creditor's meeting vide an advertisement in a local newspaper. The creditors meeting was subsequently held on 11 May 2007 whereby ARCI Enterprise was determined to be insolvent. In the same creditor's meeting, Afrizan was appointed as a provisional liquidator for ARCI Enterprise. C

[8] Subsequently, TRA, who claimed to be a creditor to ARCI Enterprise, filed a creditor's petition at the Malacca High Court seeking to wind up ARCI Enterprise based on an amount of RM6,157,121.57 which was said to be the amount owed to it by ARCI Enterprise. The Malacca High Court had, on 8 May 2008 granted the petition and wound up the partnership. Afrizan was then appointed as liquidator for the wound up partnership by the court. D

E

[9] Subsequent to ARCI Enterprise being wound up, all the five surviving partners who were the plaintiffs in the High Court action (and the respondents in the appeals before us), as contributories of ARC Enterprise, applied vide summons in chambers dated 13 June 2008, in the Malacca High Court to set aside the winding up order and for leave for ARCI Enterprise to file an affidavit of objection against the winding up petition. On 8 July 2008, the application was dismissed. F

[10] Later, the respondents filed a writ action at the Kuala Lumpur High Court against TRA and Afrizan seeking, inter alia, to set aside the winding up order dated 8 May 2008 made by the Melaka High Court against ARCI Enterprise and to set aside the appointment of Afrizan as the liquidator. G

[11] TRA and Afrizan (the first and second defendants in the said writ), filed an application to have the writ and the statement of claim against them struck out under O 18 r 19(1)(b) and (1)(d) of the Rules of the High Court 1980 ('the RHC'). The learned High Court judge, invoked summary procedure under O 14A of the RHC and held that the winding up order can be set-aside by another court of concurrent jurisdiction, and accordingly set-aside the winding up order granted by the Malacca High Court as well as the order appointing Afrizan as the liquidator of ARCI Enterprise. The learned judge was of the view that the said winding up order of the Malacca High Court 'was a nullity *ab initio* as a partnership was excluded from the regime of the Companies Act'. H

I

A **[12]** On appeal to the Court of Appeal, it was held that ARCI Enterprise as a partnership could be wound up under Part X of the Companies Act 1965 by virtue of the definition of 'unregistered company' under sub-s 314(1) of the Companies Act 1965. The High Court's order with regard to O 14A was therefore set aside and the plaintiffs' writ was reinstated.

B

[13] Dissatisfied with the above decision of the Court of Appeal, the plaintiffs having obtained leave appealed to the Federal Court against the decision of the Court of Appeal contending that it would be absurd for ARCI Enterprise as a partnership registered under the Partnership Act 1961 to also be
C categorised as an 'unregistered company' pursuant to s 314 of the Companies Act 1965. Alternatively, the plaintiffs contended that even if ARC I Enterprise was an 'unregistered company' under s 314 of the Companies Act 1965, it did not fulfil the requirements of s 314 in that it was not comprised of more than
D five partners when the winding up petition was presented at the Malacca High Court.

[14] The sole issue before the Federal Court then (as revealed in the leave question granted on 6 April 2011) was 'whether the partnership of ARCI
E Enterprise qualify as an 'unregistered company' pursuant to s 314 of the Companies Act 1965'.

[15] The Federal Court answered the question that a partnership with more than five members was an 'unregistered company' and can be wound up under
F Part X of the Companies Act 1965 by virtue of the definition of 'unregistered company' in sub-s 314(1) of the Act. The Federal Court expressed the view that the facts of the case then was not clear whether the ARCI Enterprise had only five members at the time of presentation of the winding up petition at the Malacca High Court. The Federal Court remarked that: 'On the facts of the
G instant case we are of the view that the issue of how many members of the partnership were there at the time of the presentation of the winding-up petition against the partnership could only be determined in a full trial where witnesses ought to be called and to be cross-examined so that full evidence on the matter are made available to the court for the court to make a proper
H finding on the issue'.

[16] Based on the above ruling made by the Federal Court the plaintiffs' writ was remitted to the Kuala Lumpur High Court for full trial to determine 'the issue of how many members of the partnership were there at the time of the
I presentation of the winding up petition against the partnership'.

[17] This time the case came back to the High Court before another judge. After a full trial the learned High Court judge held that 'though the partnership was registered with seven partners, there were only five partners left at the point

of presentation of the petition. In other words that first defendant ('TRA') had consciously disregarded the two bankrupts from the computation of the number of partners as five when it presented a winding up petition against ARCI Enterprise'.

[18] On that issue, the learned judge concluded that 'being a partnership of five partners, the law does not allow such a partnership to be wound up under s 314 of the Companies Act 1965 for it clearly refers to a partnership of more than five members'.

[19] Dissatisfied with that decision of the High Court, both TRA and Afrizan filed their appeals to the Court of Appeal. Both parties confined their submissions on the issue of the number of partners in ARCI Enterprise when the petition for its winding up was presented at the Malacca High Court. On 24 March 2014 the Court of Appeal after having heard the parties, dismissed the appeals and concluded:

> ... we concurred with the learned JC's finding that at the time of the presentation of the winding up petition at the Malacca High Court there were only five partners left and therefore by virtue of s 314 of the Companies Act 1965, it was not a partnership that could be wound up under s 315 of the said Act, being a partnership comprising of less than seven members. As correctly found by the learned JC, the order of winding up by the Malacca High Court was made without jurisdiction and was therefore null and void.

[20] Both TRA and Afrizan were not satisfied with the decision of the Court of Appeal and filed their notice of appeal to this court. Now, the matter came back to this court. Hence the present appeals before us.

[21] Leave to appeal was granted on 6 July 2015 initially on the following two questions, namely:

(a) whether the execution by a partner of an absolute assignment pursuant to sub-s 4(3) of the Civil Law Act 1956 and an irrevocable power of attorney for valuable consideration pursuant to sub-s 6(1) of the Powers of Attorney Act 1949 transfer all his rights and interests in the partnership in favour of its nominee/attorney and thereby confer legal status as a partner (question 1); and

(b) whether a partner, who entered a partnership pursuant to an assignment can on the true construction of s 33 of the Partnership Act 1961 be deemed a partner for the purposes of ascertaining the number of partners under sub-s 314(2) of the Companies Act 1965 (questions 2).

[22] However at the outset of the hearing of the appeals, learned counsel for the appellants indicated to the court that he would proceed only on question 2. Thus in this judgment, we would deal with only question 2.

[23] In our view the phrase, 'a partner who entered a partnership pursuant to an assignment' in question 2 refers to the assignee of the assignment in question. Therefore the real issue here is: could an assignee in this case (TRA) be deemed a partner of ARCI Enterprise for the purposes of ascertaining the number of partners under sub-s 314(2) of the Companies Act 1965. In other words, can such an assignment conferred on the assignee legal status as a partner in a partnership?

DECISION OF THE HIGH COURT

[24] The learned High Court judge in dealing with this issue made the following findings:

> However learned counsel for the defendants submitted that the partner Syed Kharul Azhar had by an agreement and by a power of attorney dated 30 January 1997 duly registered with the High Court had assigned all of his rights, title and interests in the first ARCI Enterprise to the first defendant who had in turn appointed the third defendant to represent its interest.
>
> I agree with learned counsel for the plaintiffs that such an assignment does not in any way give rights to the first defendant and/or its nominee/attorney to participate in the partnership of the first ARCI Enterprise. The rights of an assignee with respect to his share in the partnership is circumscribed by s 33 of the Partnership Act as follows:
>
> > 33 Rights of assignee of share in partnership
> >
> > (1) An, assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership book, but entitles the assignee only to receive the share of the profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.
> >
> > (2) In the case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

Therefore the act of the third defendant in calling for an convening a creditor's meeting on 11 May 2007 and in unison with the first defendant appointing a provisional liquidator at the creditor's meeting can clearly be castigated as interfering with the management and administration of the first ARCI Enterprise.

[25] The learned judge referred to the relevant passage in *Lindley on Partnership* at pp 383–384 (which was cited by Abdul Malek J (as he then was) in the case of *Ong Kian Loo v Hock Wah Trading Co* [1990] 1 MLJ 315), which states:

When persons enter into a contract of partnership, their intention ordinarily is that a partnership shall exist between themselves and themselves alone. The mutual confidence reposed by each in the other is one of the main elements in the contract, and it is obvious that persons may be willing enough to trust one another, and yet be unwilling to place the same trust in anyone else. Hence it is one of the fundamental principles of partnership law, expressly recognised by the Partnership Act 1890, that no person may be introduced as a partner without the consent of all existing partners. If, therefore, a partner dies, his executors or devisees have no right to insist on being admitted into partnership with the surviving partners, unless some agreement to that effect has been entered into by them.

Still less can a partner by assigning his share entitle his assignee to take his place in the partnership against the will of the other members. The assignment, however, is by no means inoperative; on the contrary, it involves several important consequences, more especially as regards the dissolution of the firm and the right of the assignee to an account.

Where a partner has an unconditional right to transfer his share, he may transfer it to a pauper, and thus get rid of all liability as between himself and his co-partners in respect of transactions subsequent to the transfer and notice thereof given to them. But even in this case the transfer alone does not render the transferee a member of the partnership, and liable as between himself and the other members to any of the debts of the firm. In order to render him a partner with the other members, they must acknowledge him to be a partner, or permit him to act as such.

DECISION OF THE COURT OF APPEAL

[26] The Court of Appeal agreed with and affirmed the decision of the learned judge. The Court of Appeal in its preliminary observation remarked that there was only one issue as singled out by the Federal Court (when it first remitted the matter to the High Court for trial) ie to determine how many members of ARCI Enterprise were there at the time of presentation of the winding up petition against it.

[27] The Court of Appeal was of the view that 'according to the fundamental principles of partnership law, subject to any agreement express or implied, between the partners, no person may be introduced as a partner without the

consent of all existing partners ... an attempt by any one partner to introduce a new partner without consent amounts only to an assignment of part of his share in the partnership'.

[28] At para 53 of its judgment, the Court of Appeal elaborated as follows:

> The authorities referred to in Halsbury have also established beyond doubt that by 'members' it does not include trustees of bankrupt members. In the instant case, upon being adjudicated a bankrupt, the official assignee took on the role as trustee in bankruptcy of Syed Kharul Azhar. Since the position is that even a trustee of a bankrupt member could not be considered as a 'member', in the instant case, regardless of whether the first defendant has obtained any sanction from the official assignee, by necessary implication, the first defendant (or for the matter the bankrupt partner himself), could not be regarded as a 'member' for the purpose of determining the number of members required under s 314 of the Companies Act 1965.

[29] In its conclusion, the Court of Appeal dismissed the appeals by TRA and Afrizan. It affirmed the findings of the learned High Court judge that at the time of the presentation of the winding up petition at the Melaka High Court there were only five partners left and therefore ARCI Enterprise could not be wound up under ss 314 and 315 of the Companies Act 1965. In other words, the assignee and the attorney of the bankrupt partner (Syed) cannot in law be considered as a partner in the partnership for the purpose of computation in s 314 of the Companies Act 1965.

[30] As clearly stated by the Court of Appeal in its judgment, 'A perusal of the notes of proceedings showed that learned counsel for the defendants clearly agreed to proceed on the single issue proposed by the learned JC. Learned counsel for the plaintiffs too agreed that if the question was answered in their favour it will solve everything ... parties quite rightly agreed before us to confine their submissions to the prime issue as identified by the Federal Court'.

SUBMISSIONS BY THE APPELLANTS' COUNSEL

[31] Learned counsel for the appellants submitted that the winding up order ought not to have been set aside by the courts below in view that at all material times during the presentation of the creditor's petition by TRA against ARCI Enterprise, there were six partners (including Cedric) and therefore that the threshold to qualify the partnership as an 'unregistered company' under s 314 of the Companies Act 1965 had been met. It was contended by learned counsel that the assignment in question by Syed and the appointment of Cedric as the attorney of Syed, vide the power of attorney and the assignment agreement, meant that TRA/Cedric had effectively taken Syed's place as a partner in ARCI

Enterprise. Learned counsel claimed that the assignment agreement and the power of attorney were addressed to the partners in ARCI Enterprise thereby giving them notice of the assignment.

[32] Citing cll 5(1), 5(11) and 6 of the assignment agreement, learned counsel stressed that it was Syed's intention to transfer and abrogate all his rights and title in ARCI Enterprise to TRA/Cedric; Syed agreeing not to pursue any claims against any one relating to his interest in the partnership, and Syed's appointment of Cedric as his attorney to execute relevant documents on his behalf, which includes transfer forms relating to his interest in ARCI Enterprise.

[33] In short, learned counsel contended that there were express terms which demonstrate Syed's intention to be completely removed from ARCI Enterprise and to admit Cedric/TRA in his place to receive his rights and interest as a partner in ARCI Enterprise.

[34] In support of that argument, learned counsel cited the following authorities, namely:

(a) *Mohamed Tawfik bin Tun Dr Ismail v HLG Credit Sd Bhd & Anor* [2012] 2 MLJ 626; [2012] 2 CLJ 65;

(b) *Sri Alam Sdn Bhd v Newacres Sdn Bhd* [1992] MLJU 19;

(c) *K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBF Finance Bhd & Anor* [2005] 2 MLJ 201;

(d) *Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor* [2011] 1 MLJ 486; and

(e) *Chon Ah Jee @ Chuan Teck Chun & Ors v Lim Tian Huat (as the receiver and manager appointed for Bigraise Telipok Sdn Bhd) & Anor* [2010] 4 MLJ 270.

[35] Learned counsel argued, (as stated in para 53 of his written submissions), that:

(a) an irrevocable power of attorney for valuable consideration cannot be revoked, discharged, terminated or rendered ineffective, amongst others by the death or bankruptcy of the donor unless with the consent of the donee;

(b) an assignment which is legally executed shall cause the transfer of all legal rights, remedies and liabilities of the assignor to the assignee; and

(c) an assignee having obtained absolute rights vide the assignment is entitled to be substituted in place of the assignor.

[36] Learned counsel also contended that the existence of the assignment agreement and the power of attorney was within the knowledge of the remaining partners of ARCI Enterprise and they did not challenge it. Therefore the former partnership consisting of Syed would effectively be dissolved and a new partnership arose with Cedric as a new partner in the partnership.

[37] Learned counsel further contended that the Court of Appeal was wrong in deciding that the assignment and power of attorney in question did not give TRA and/or Cedric, any right as a partner in the partnership.

[38] Learned counsel also argued that the partnership in question was long dissolved and deregistered since 28 October 2000 when the eight year term of the partnership which was incorporated on 4 October 1992, had expired and was not renewed; or in any event by 9 July 2003/19 April 2005 when Yee and Syed were adjudged bankrupt respectively. Therefore, the prohibition under sub-s 33(1) of the Partnership Act 1961 was not applicable on the ground that the partnership was no longer 'in continuance'.

[39] In his conclusion, learned counsel summarised the appellants' position as follows:

(a) upon the bankruptcy of a partner of a partnership, unless stated otherwise by way of an agreement between the partners, s 35 of the Partnership Act 1961 renders an automatic dissolution of the partnership;

(b) on the said dissolution, the assignee of any rights of a partner is entitled to receive the share of the partnership assets which the assigning partner is entitled to and to an account from the date of the dissolution, as provided for in s 33 of the Partnership Act 1961;

(c) ss 40 and 41 of the Partnership Act 1961 provides that the partners, save for the bankrupt partner, will be entitled to continue with the affairs of the partnership for the purposes of its dissolution, and for that purpose any partner or his representatives may apply to wind up the business and affairs of the firm;

(d) the bankrupt partner is not kicked out from the dissolved partnership and does not create a new set of partnership with the remaining partners intact unless the agreement states otherwise;

(e) if the remaining partners continue the business of the partnership, the trustee of the bankrupt partner is entitled to claim the profits derived from the use of the assets of the partnership; and

(f) the proper construction of s 33 of the Partnership Act 1961, is that the assignee or even a trustee in bankruptcy steps into the partner's shoes to

allow the said assignee or trustee to receive an account of the partnership and receive the proceeds thereof from the assets. The partnership continues, but only for a limited purpose of winding up and the dissolution of the said partnership; and for this purpose, the bankrupt members of the partnership are still considered as members of the partnership.

[40] In a nut-shell, learned counsel's stand is that, for the purpose of the winding up petition filed by the appellants, there was in existence a partnership with more than five members (which includes the assignee) which falls under the category of 'unregistered company' and thus entitling a petition to be filed under ss 314 and 315 of the Companies Act 1965.

SUBMISSIONS BY THE RESPONDENTS' COUNSEL

[41] Learned counsel for the respondents argued that an assignee, on a true construction of s 33 of the Partnership Act 1961 was not a partner in the true sense and therefore could not be considered as a member for the purposes of computation under s 314 of the Companies Act 1965. He was not entitled to participate in the management or administration of the partnership business or affairs or to inspect the accounts of the partnership, except in the case of dissolution where it was necessary to ascertain his proper share.

[42] Learned counsel further argued that an attempt to assign the right to be a partner in the true sense would be contrary to the express words as well as the spirit and intent of sub-ss 26(g), 33(1) and (2) of the Partnership Act 1961. Neither an assignee nor an attorney can bring himself within the definition of a 'relationship of partnership' under sub-s 3(1) of the Partnership Act 1961.

[43] Citing the provisions of sub-s 26(g) of the Partnership Act 1961, learned counsel submitted that an assignee or any other person cannot be introduced as a partner in the partnership without the consent of all existing partners.

[44] A partner may have an unconditional right to transfer his interest and shares in the partnership to a third party assignee/attorney either by way of an absolute assignment or conditional assignment, but as stated by in *Lindley on Partnership* at p 383, 'the transfer alone does not render the transferee a member of the partnership ... In order to render him a partner with the other members, they must acknowledge him to be a partner or permit him to act as such still less can a partner by assigning his share entitle his assignee to take his place in the partnership against the will of the other members'.

[45] The same proposition was adopted in *Bray v Fromont & Others* (1821)

6 Madd 5; [1821] Feb 6; and *Cassels v Stewart* (1881) 6 App Cas 64.

[46] It is no doubt that the deed of assignment dated 10 January 1997 in the present case transfers and assigns absolutely to TRA (or its nominee) all of Syed's rights, title, interests, choses in action and benefits arising or deriving from his interests in the partnership and any agreement past, future or present to which the partnership is a party, which includes the related land, the mining certificate and the mining lease.

[47] Clause 6 of the said deed of assignment provides:

> 6. Pursuant to the above, I will, by Power of Attorney, executed herewith appoint CEDRIC DAVID JOSEPH WILLIAMSON as my lawful attorney on my behalf to do and sign all things or documents required by TRA to give effect to the above including, without limitation, any transfer forms relating to my interest in ARCI ENTERPRISE is a party, sub-lease or deeds of trust or other documents required to effect the foregoing, and I am in agreement to assign absolutely or sub-let to TRA (or as TRA shall direct) all my title, interest, rights and benefits arising or deriving from the Mining Lease when it is issued by the relevant authorities.

[48] The scope of the said assignment is not unlimited. It did not cover everything that Syed as a partner could do in the running the business and affairs of ARCI Enterprise. The assignment and the power of attorney was only to enable Cedric to do and sign all things or documents required by TRA to give effect to the above objects of the assignment. Clearly it did not cover the object of making Cedric, as an attorney or TRA as an assignee, to become a partner in place of Syed, the assignor in the partnership. It did not extend to allow the assignee or the attorney to take part or to interfere in the management or administration of the partnership business or affairs. Statutorily, TRA as an assignee was only entitled to receive the share of profits to which the assignor (Syed) would otherwise be entitled to. This is clearly provided for in sub-s 33(1) of the Partnership Act 1961:

> (1) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of the profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

[49] The assignment may be an absolute assignment. But the wording of the deed of assignment in question are too general. There is no indication to show that the assignment confers the status of partner in the partnership. The general words in the deed of assignment and power of attorney do not confer general

powers to the assignee or attorney. Subject to statutory restrictions, those words can only be interpreted limited to the purpose for which the authority or power is given (see: *Bowstead & Reynolds an Agency* (20th Ed) Sweet & Maxwell). In the present case, the purpose of the assignment was as set out in clause 6 of the said assignment.

[50] In *In re Bowling & Welby's Contract* [1895] 1 Ch 663 Lord Halsbury had the occasion to interpret the provisions of s 199 of the English Companies Act 1862, which, except for the number of members stated therein, was of the same effect with s 314 of our Companies Act 1965. The relevant part of the said s 199 was that '... any partnership consisting of more than seven members and not registered under this Act, and hereinafter included under the term unregistered company, may be wound up under this Act'. His Lordship interpreted the words 'more than seven members' to mean 'the required number, that is exceeding seven, of persons who are actually members'. His Lordship went on to stress that 'I think that the language is susceptible to no other construction'.

[51] Learned counsel for the appellants submitted that all the existing partners had express notice or knowledge of the assignment agreement and the power of attorney in view of the facts that:

(a) the assignment agreement was expressly issued to the partners as seen on the first page of the same;

(b) since the fact that Cedric executed the JVA on 25 February 1997 on behalf of Syed without contention from the other partners, clearly showed that they had knowledge of the said assignment agreement and the irrevocable power of attorney; and

(c) both the assignment agreement and the power of attorney was produced by Yong Kat Keong (a party in the proceedings), in an affidavit affirmed by him, which thereby demonstrated that the document was not only within his possession but further within his knowledge.

[52] Apparently, at p 1 of the deed of assignment, the assignment was directed to TRA as well as to the existing partners of ARCI Enterprise then. It was an assignment agreement executed by Syed in favour of TRA and also appointing Cedric as his attorney. It was signed by Syed and countersigned by Cedric, who at that material time was a director of TRA. Our considered view is that giving notice of the assignment to the existing partners did not mean that all the existing partners consented to accept TRA or Cedric as a partner in ARCI Enterprise. In any event, there is nothing in the deed of assignment to expressly indicate that TRA or Cedric would be given the status of a partner in the partnership in place of Syed. The assignment documents may be in the

possession and knowledge of the existing partners as alleged by the appellants, but, that alone does not constitute consent on their part as required by law.

[53] The signing of the JVA on 25 February 1997 where Cedric signed on behalf or as attorney of Syed (who was still a partner then) does not in any way indicate that Cedric was or acted as a partner of ARCI Enterprise at that time. Cedric signed at the column for TRA, 'for or and on behalf of TRA' on the one part and at the same time signed at the column for Syed 'as a partner of the partnership' on the other part of the JVA, with a hand written notation 'by his attorney'. Moreover the said JVA, as appeared at p 1, thereof, was between TRA on the one part and all the partners of the partnership, including Syed on the other part. This clearly was insufficient to create an effective consent for the purpose of accepting TRA or Cedric as a partner in ARCI Enterprise.

[54] Learned counsel for the appellants also submitted that consent of the other remaining partners need not be in the form of express consent; but the same may be given by way of a tacit acknowledgement by existing partners to the transfer of the partnership shares by one partner to a third party or an assignee. It was submitted that based on the facts and circumstances of the case, all the remaining partners of ARCI Enterprise had given their tacit acknowledgment and acquiesced to the admission of Cedric as a partner in the partnership in place of Syed.

[55] We agree that consent may be given by way of tacit agreement to be implied between all the partners. It need not necessarily be by way of an express consent. In *Lindley & Banks on Partnership* it is stated that tacit consent or agreement may be acceptable to establish consent of the existing partners; and at p 642 it is stated that '... if persons originally interested in the mine are not only part-owners but also partners, a transferee of the share of one of them, although he would become a part-owner with the others, would not become a partner with them in the proper sense of the word, unless by agreement, express or tacit'.

[56] We have scrutinised the evidence and documents in the present case, and found no sufficient evidence to support a finding that tacit consent was given by the remaining partners to accept or to admit the assignee, TRA or Cedris, as a partner in the partnership as submitted by learned counsel.

[57] In short, the appellants in the present case had failed to adduce evidence to establish consent on the part of all the existing partners relating to the assignee's status as a partner in the partnership. Therefore the assignee/attorney cannot be considered as a partner for the purpose of computation under s 314 of the Companies Act 1965.

[58] Learned counsel for the appellants raised a new issue in his submission, before us, which was not raised at the court below. He contended that by virtue of sub-s 38(1)(d) of the Bankruptcy Act 1967, both Syed and Yee, being bankrupts were prohibited from entering into or carrying on any business either alone or in partnership. Learned counsel submitted that by virtue of s 35 of the Partnership Act 1961, every partnership is automatically dissolved as regards all the partners by the bankruptcy of any partner and by virtue of s 40 of the same Act, the remaining partners, save for the bankrupt, are entitled to continue the partnership, only for the purpose of dissolving or winding up its affairs.

[59] Learned counsel for the appellants argued that since ARCI Enterprise was dissolved as early as 9 July 2003 when one of the partners, Yee, was adjudged bankrupt, the prohibition under sub-s 33(1) of the Partnership Act 1961 for an assignee not to interfere in the management or administration of the partnership business or affairs during the continuance of the partnership was not applicable for the reason that the said partnership which has been dissolved was no longer 'in continuance'. Thus, learned counsel contended that the prohibition only applied during the continuance of the partnership but not after it had been dissolved and no longer 'in continuance'.

[60] Learned counsel also submitted that by virtue of s 41 of the Partnership Act 1961, the assignee, Cedric, as 'representative' of Syed may apply to the court to wind up the business and affairs of the partnership.

[61] Our view is that the rights of an assignee in the case of a dissolution of a partnership is clearly provided for in sub-s 33(2) of the Partnership Act 1961 in that 'the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and for the purpose of ascertaining that share, to an account as from the date of the dissolution'. Reading together sub-s 33(2) together with sub-s 33(1), it is beyond doubt that an assignee in the case of dissolution of a partnership is only entitled to receive the share to which the assigning partner, is entitled and to an account as from the date of the dissolution, for the purpose of ascertaining that share, but not to interfere in the management or administration of the partnership business or affairs.

[62] Section 40 of the Partnership Act 1961 which was relied upon by learned counsel, reads as follows:

> 40 *Continuing authority of partners for purposes of winding up*
>
> After the dissolution of a partnership, the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue, notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the

A time of the dissolution, but not otherwise: Provided that the firm is in no case bound by the acts of a partner who has become bankrupt; but this provision does not affect the liability of any person who has, after the bankruptcy, represented himself or knowingly suffered himself to be represented as a partner of the bankrupt.

B

[63] Under the section, even after dissolution of a partnership, the authority of each partner to bind the firm and the other rights and obligations of the partners, continue not only for the purpose of winding up the affairs of the partnership but also to complete transactions begun but unfinished at the time C of the dissolution. The partnership is deemed to continue for those purposes. Unsettled business or affairs of the partnership need to be settled and completed.

D **[64]** To interpret s 40 as to allow an assignee 'to complete transactions begun but unfinished at the time of the dissolution' would mean an assignee is allowed to take part or interfere in the business transactions of the partnership. This would be contrary to the spirit of s 33 of the Partnership Act 1961.

E **[65]** Section 33 of the Partnership Act 1961 specifically deals with 'rights of assignee of share in partnership', while s 40 deals with 'continuing authority of partners for purposes of winding up' In the case of a dissolution of the partnership, the rights of an assignee is clearly defined in sub-s 33(2) in that 'the assignee is entitled to receive the share of the partnership to which the assigning F partner is entitled as between himself and the other partners, and the purpose of ascertaining that share, to an account as from the date of the dissolution'. On the other hand, s 40 of the Partnership Act 1961, does not in any way provide any rights to an assignee, to participate or to take part in the business of the partnership. It does not help the appellants in their case before us.

G

[66] It must be stressed here that the rights and interests of an assignee are strictly confined to the terms or scope of the assignment agreement between the assignor (Syed) and the assignee (TRA). This is important so as not to allow the assignee to embark on matters not specifically within the terms or scope of the H assignment, which may be prejudicial to or adversely affect the interests of other existing partners. A contract of partnership is based on personal relationship between the partners that exist between themselves, and themselves alone. An assignment by a partner of his partnership shares entitles the assignee to limited rights only as expressly provided for in the assignment I agreement but not otherwise; (see: *Halsbury's Law of England* (5th Ed, Vol 79) para 124).

[67] In the present case, the subject matter of the assignment dated 30 January 1997 between Syed and TRA relates to Syed's intention to transfer

and assign absolutely to TRA (or its nominee) all of his rights, title, interests, choses in action and benefits arising from his interest in the partnership, any agreement past, future or present to which the partnership was a party, the land, the mining certificate and the mining lease. For that matter, Cedric was appointed by Syed as his lawful attorney on his behalf to do and sign all documents required by TRA to give effect to the assignment.

[68] There was no mention about 'liability' of Syed in the partnership in the event the partnership is dissolved, the result of which is that there is a short fall in the assets of the partnership to pay creditors or other debts. The issue of 'liability' was excluded totally from the terms or scope of the assignment. It is trite law that in the event a partnership is dissolved, terminated or wound up all partners as contributories, are equally liable to the liability of the partnership if there is any shortfall in its assets to pay up creditors and other debts. If the assignee (TRA), is accepted as a partner (even for the purpose of a winding up process under s 314 of the Companies Act 1965) and by relying on the terms or scope of the assignment agreement, it would escape 'liability' in the event of any shortfall in the assets of the partnership to pay the debts of the partnership. This may not be desirable to the business world as it would create unfair dealings which may prejudice the other existing partners. To adopt the words of Lindley LJ in *In re Bowling* 'it would be most disastrous as a matter of business if it were so'.

[69] Learned counsel for the appellants also cited s 41 of the Partnership Act 1961 in his attempt to strengthen the appellants' case and to convince us that the assignee/attorney in this case had the right to apply to the court to wind up the business and affairs of the partnership for the purpose as stated in that section.

[70] Section 41 deals with 'rights of partners as to application of partnership property' on the dissolution of the partnership. It reads as follows:

> 41 *Rights of partners as to application of partnership property*
>
> On the dissolution of a partnership, every partner is entitled, as against the other partners in the firm and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively, after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may, on the termination of the partnership, apply to the court to wind up the business and affairs of the firm.

[71] We are of the view that the right to wind up a partnership under s 41 is only open to 'any partner or his representatives', but not to any other person or entity. Such right accrues only 'on the termination' of the partnership ie after

the completion of the process of applying in payment of the debts and liabilities of the partnership, and if there is any surplus, in applying in payment of what may be due to the partners respectively.

[72] 'Dissolution' and 'termination' are two different and distinct stages before the process of winding up of a partnership can take place. This has been clearly observed by the Federal Court, in its earlier judgment involving this case as reported in *Thein Hong Teck & Ors v Mohd Afrizan bin Husain and another appeal* [2012] 2 MLJ 299 where it was held:

> Dissolution is distinct from the 'winding-up' of a partnership business. Although the term dissolution implies termination, dissolution is actually the beginning of the process that ultimately terminates a partnership. For example, if a partner resigns or if a partnership expels a partner, the partnership is considered legally dissolved s 40 of the Partnership Act 1961 provides that after the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue, notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership. Under s 41 of the Partnership Act 1961 any partner or his representative may on the termination of a partnership, apply to the court to wind up the business and affairs of the firm.

[73] It must be stated that only a partner or his representative can apply to wind up a partnership under s 41 of the Partnership Act 1961. In the present case, the winding up petition dated 16 April 2007 at the Malacca High Court was filed by TRA as a creditor. It was a creditor's petition filed under ss 314 and 315 of the Companies Act 1965, not a partner's petition as stipulated under ss 37 and 41 of the Partnership Act 1961. In the winding up petition, TRA claimed to be a creditor to a debt owed by ARCI Enterprise (not as an assignee or representative of Syed, who had lost his status as a partner because of his bankruptcy). TRA sought an order to wind up ARCI Enterprise on the ground that the partnership owed TRA a sum of RM6,157,121.57 as at 1 December 2008. There was no indication at all in the winding up petition to show that TRA or Cedric were assigneelattorney or representative of Syed.

[74] TRA or Cedric did not petition to wind up the partnership as representatives of any partner of ARCI Enterprise, as stipulated in s 41 of the Partnership Act 1961.

LOCUS STANDI

[75] On the issue of locus standi, learned counsel for the appellants submitted that the respondents in this appeal ie the remaining partners of ARCI Enterprise had no locus standi to commence the present writ action at the Kuala Lumpur High Court after the partnership had been dissolved by operation of law when its business registration expired on 28 October 2000 and later when one of its partners, Yee was adjudged bankrupt on 9 July 2003.

Learned counsel also submitted that, if there was any cause of action at all against the appellants, the same belonged to the partnership, itself, but not the respondents in their personal capacities, and therefore on the ground of locus standi issue alone, the appeals ought to be decided in the appellants' favour.

[76] Learned counsel for the respondents on the other hand argued that the respondents as plaintiffs in the writ in question did not sue as a firm but as individuals and members of the partnership; therefore the question of locus standi to act for the partnership did not arise.

[77] We have considered the statement of claim in the writ action filed by all the plaintiffs there. In paras 1–5 thereof, all the five plaintiffs described themselves specifically and individually as a partner in a partnership known as ARCI Enterprise and having his address of service at No 335, Taman Kemajuan Raub, 27800 Pahang. This fact speaks for itself ie all the five remaining partners were suing the appellants individually as a partner of the partnership. They were not suing 'in the name of ARCI Enterprise' or 'for and on behalf of ARCI Enterprise'. Each of them was the plaintiff in the writ action, not ARCI Enterprise.

[78] Locus standi or standing in the court of law refers to the legal capacity or the right of a party to appear and be heard before the court of law. It also means entitlement to judicial relief to be granted by the court of law. In dealing with the issue of locus standi the court is bound to proceed on the basis that everything alleged in the statement of claim and in the documents relied upon by the plaintiffs is true; and the jurisdiction to uphold a plea of no locus standi should only be exercised very carefully in circumtances where there is no possibility of doubt (see: *Hayes v Bristol Plant Hire Ltd & Ors* [1957] 1 All ER 685; and *Tan Guan Eng & Anor v Ng Kweng Hee & Ors* [1992] 1 MLJ 487).

[79] In order to establish that a person or a plaintiff has a locus standi in a proceedings before the court, he must satisfy the court that he possesses an interest in the issue raised in the proceedings. The court has to be satisfied that there was an infringement of a legal right or a breach of a statute which affects the plaintiff's interests substantially or the plaintiff has some genuine interest in having his legal position determined by the court in the proceedings (see: *Boyce v Paddington Borough Council* [1903] 1 Ch 109; *Tan Sri Othman Saat v Mohamad Ismail* [1982] 2 MLJ 177; *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12; *Dewan Pemuda Masjid Malaysia v SIS Forum (Malaysia)* [2012] 1 MLJ 126).

[80] The statement of claim filed by the plaintiffs in the present case prayed, inter alia, for declarations against (the defendants) that the order of the Malacca High Court dated 8 May 2008 which ordered ARCI Enterprise to be wound

A up and the appointment of Mohd Afrizan was not valid in law and to be set aside. The plaintiffs claimed that there was no judgment obtained for the alleged debts against ARCI Enterprise; the winding up petition was not served on the partnership but was only served on Afrizan as the liquidator who was appointed by the creditors who at the material time had no authority to accept
B the winding up petition on behalf of the partnership. The respondents first made an application at the Malacca High Court to set aside the said winding up order but was dismissed based on a preliminary objection by the appellants that no party could represent the partnership that was earlier wound up except the liquidator appointed by the Malacca High Court.
C

[81] The plaintiffs also averred in the statement of claim that there was a bone fide dispute as to the debts in question and the debts were not proven; Afrizan who was the liquidator for the partnership failed to oppose the
D petition, and that it was contrary to the provisions of s 315 of the Companies Act 1965.

[82] As stated earlier in this judgment, paras 1–5 of the statement of claim state that all the plaintiffs were suing the defendants individually as partners of
E the partnership. At para 16 of the statement of claim, the plaintiffs averred that 'the plaintiffs as partners for ARCI Enterprise had never at any of the material time agreed and/or gave approval and/or accepted the first defendant and/or the third defendant as partner in ARCI Enterprise'.

F **[83]** It was also not in dispute that all the five plaintiffs at the material time, before the presentation of the winding up petition, were the existing partners in ARCI Enterprise. Being partners, they were also contributories in the event the partnership was dissolved or wound up. As contributories, they would in law be liable to make good any deficiency in the event the assets of the partnership was
G insufficient to cover or to pay up all the debts owed by the partnership. This is pursuant to s 314(2) read together with s 316(1) of the Companies Act 1965.

[84] Section 316(1) of the Companies Act 1965 provides:

H 316(1) On an unregistered company being wound up every person shall be a contributory —

(a) who is liable to pay or contribute to the payment of –

(i) any debt or liability of the company;

I (ii) any sum for the adjustment of the rights of the members among themselves; or

(iii) the costs and expenses of winding up; or

(b) where the company has been dissolved in the place in which it is formed or incorporated, who immediately before the dissolution was so liable, and

every contributory shall be liable to contribute to the assets of the company all sums due from him in respect of any such liability. A

[85] Section 46 of the Partnership Act 1961 is also relevant on the issue. It deals with liability and rights or interest of each partner in settling accounts between the partner at the end of dissolution or winding up process of the partnership. The section provides: B

46 In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:

(a) losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits; and C

(b) the assets of the firm, including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order: D

(i) in paying the debts and liabilities of the firm to persons who are not partners therein;

(ii) in paying to each partner rateably what is due from the firm to him for advances as distinguished from capital; E

(iii) in paying to each partner rateably what is due from the firm to him in respect of capital; and

(iv) the ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible. F

[86] Subsection 31(2) of the Companies Act 1965 provides: 'the court or liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies'. G

[87] Hence, it is obvious that all the plaintiffs as partners and contributories of ARCI Enterprise would have legitimate interests in settling accounts between them in the partnership either in making contributions to make up for losses or deficiencies of capital to pay up debts or to be paid on the ultimate residue, if any. These interests are sufficient grounds for them to have locus standi in the proceedings to set aside the winding up order against ARCI Enterprise. On the strength of the authorities cited above, there was prima facie an infringement of their legal rights and/or breach of statutes which affected their interests substantially. There was an element of genuine interest in having their legal position determined by the court in the proceedings. H I

ABUSE OF PROCESS

[88] Learned counsel for the appellants also raised the issue of an abuse of process of the courts by the respondents. Learned counsel contended that the respondents should have filed an appeal against the winding up order made by the Malacca High Court and not by way of collateral attack in a new suit at the Kuala Lumpur High Court, as was done in the present case. He cited the decision of the Federal Court in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 as an authority to say that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction.

[89] In our view what has been ruled by the Federal Court in *Badiaddin*'s case is the general rule that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. There is a clear exception to that general rule as elaborated by Mohd Azmi FCJ in the same paragraph of the judgment which in full reads as follows:

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank* case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court' ... which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make.

[90] The Federal Court in that case agreed and adopted the decision of Abdoolcader J (as he then was) in *Eu Finance Berhad v Lim Yoke Foo* [1982] 2 MLJ 37 where His Lordship ruled:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent.

[91] Gopal Sri Ram JCA (later FCJ) in *Badiaddin*'s case, expressed similar view:

> of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, upon the illegality being clearly shown, togrant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal.

[92] In the present case the plaintiffs were challenging the winding up order made by the Malacca High Court on the ground that the order was a nullity for having seen made in contravention of ss 314 and 315 of the Companies Act 1965 and s 33 of the Partnership Act 1961. In other words, the Malacca High Court had no jurisdiction to make such an order when it failed to comply with the relevant statutory provisions of law as cited above. That being the case, the subject matter of the collateral proceedings filed by the respondents in the Kuala Lumpur High Court came within the exception to the general rule as discussed above. Therefore the respondents may proceed with it without having to go by way of an appeal as argued by learned counsel for the appellants; and therefore the question of an abuse of process as complained by learned counsel for the appellants did not arise.

Absolute assignment: Subsection 4(3) of the Civil Law Act 1956

[93] Learned counsel for the appellants also submitted that an absolute assignment for a consideration which had been legally executed had the effect of transferring absolutely the rights, interest, liabilities and remedies previously afforded to the assignor to the assignee; and an assignee having obtained absolute rights vide the assignment was entitled to be substituted in place of the assignor. Learned counsel cited sub-s 4(3) of the Civil Law Act 1956 to support this submission.

[94] Subsection 4(3) of the Civil Law Act 1956 reads:

> (3) Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

[95] We do not think s 4(3) of the Civil Law Act 1956 supported the appellants' case. Subsection 4(3) only deals with an assignment of a debt or

chose in action. It does not in any way pass or transfer the status of the assignor in a partnership to the assignee. As defined in sub-s 3(1) of the Partnership Act 1961, partnership means 'a relationship between persons carrying on business in common with a view of profit ...'. That relationship between partners in a partnership cannot be assigned, either absolutely or conditionally, under sub-s 4(3) of the Civil Law Act 1956. It is not a debt. It is also not a legal chose in action. It is a relationship between persons carrying on business in common with a view of profit. Thus the submission by learned counsel on this point cannot be upheld.

SANCTION OF INSOLVENCY DEPARTMENT

[96] The issue of sanction from the Insolvency Department Malaysia was also raised by learned counsel for the appellants during his submission. According to him, the Insolvency Department Malaysia had, vide its letter dated 18 May 2007, allowed TRA to maintain the rights and interest of Syed in all matters relating to the partnership.

[97] The Court of Appeal had dealt with this issue quite extensively in its judgment. We reproduce the relevant part of the judgment:

> [54] Next, about the alleged 'sanction' dated 18 May 200 7 obtained from the Official Assignee. Having perused the document, we find that there was actually no sanction being granted by the Official Assignee. In fact, this is very clear from the letter which says:
>
> > 2. Ketua Pengarah lnsolvensi bersetuju dengan permintaan tuan bahawa hak dan kepentingan si bankrap Syed Kharul Azhar bin Syed Talib dalam perkongsian ARCI Enterprise diserahkan kepada TRA Mining sepertimana perjanjian yang dimasuki oleh pihak berkenaan bertarikh 30 January 1997. lni adalah kerana tarikh Penerimaan dan Perintah Penghukuman dibuat terhadap bankrap ialah pada 19 April 2005, hampir 8 tahun selepas perjanjian tersebut.
> >
> > 3. ... [pihak] tuan telah diiktiraf (acknowledge) sebagai pemilik hak si bankrap dan terpulang kepada tuan untuk mengambil tindakan selanjutnya.
>
> [55] It is apparent that the letter issued by the Director General of Insolvency 'acknowledged' (to borrow the word used in the letter) the first defendant as the rightful owner of the bankrupt partner's right and interests in the first ARCI Enterprise pursuant to the deed of assignment entered into between the parties previously. But as we have shown earlier, being the rightful owner of a bankrupt partner's rights and interests pursuant to an absolute assignment does not automatically turn an assignee into a partner.

[98] We agree with the aforesaid ruling by the Court of Appeal. We would add further that even if the said letter signified sanction from the Insolvency Department Malaysia (which was not the case) it did not amount to giving sanction to TRA to file a creditor's winding up petition in court against ARCI

Enterprise. At most, the said letter amounted to an acknowledgement by the Insolvency Department on the status of TRA as the owner or assignee of Syed's rights and interests in ARCI Enterprise. As stated earlier in this judgement, as an assigned to the bankrupt's rights and interest, TRA was not entitled to file a creditor's winding up petition for a debt allegedly owed by ARCI Enterprise to TRA. A creditor per se is not the same as an assignee. It was not part of Syed's rights and interest, as a bankrupt to file a creditor's petition to wind up ARCI Enterprise. Thus, the said letter from the Insolvency Department, Malaysia dated 18 May 2007 does not help the appellants at all in their case before us.

CONCLUSION

[99] Premised on the aforesaid reasons and in all the circumstances of the case, we would answer question 2 in the negative in that a person or an assignee who entered a partnership pursuant to an assignment could not, on a true and proper construction of s 33 of the Partnership Act 1961, be deemed a partner for the purposes of ascertaining the number of partners under sub-s 314(1) of the Companies Act 1965.

[100] In the upshot we dismiss both appeals by both appellants with costs; and we affirm the decisions of both the High Court and the Court of Appeal in respect thereof.

Appeals dismissed with costs; decisions of the High Court and Court of Appeal affirmed.

Reported by Ashok Kumar